Mashkin Freight Lines, Inc. *and* **William J. Davis** *and* **Allen Savage.** Cases 39-CA-187[1] and 39-CA-350

May 28, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On September 30, 1981, Administrative Law Judge Stephen J. Gross issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Mashkin Freight Lines, Inc., Hartford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Bari Leasing, Inc., was also alleged as a Respondent in Case 39-CA-187. Since no evidence was adduced to indicate that Bari Leasing had any connection with the alleged offenses, the General Counsel agreed to the dismissal of the complaint against Bari Leasing. See ALJD, fn. 3.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] Respondent maintains that the Board should defer to arbitration in this matter. In light of the uncertainty surrounding which of the two collective-bargaining agreements is applicable in the present situation, Chairman Van de Water and Member Zimmerman deem it inappropriate to defer to arbitration. Member Fanning, in any event, would not defer to arbitration.

Chairman Van de Water would find the discharge of employee Savage not a violation of Sec. 8(a)(1) and (3). Respondent, by establishing that Savage ignored a direct order of the dispatcher to "layover" and not take a load to the Hartford terminal, effectively rebutted any *prima facie* case that Savage was terminated for discriminitory reasons. It should be noted that Savage had the choice of not taking the load at all and could have returned to his home via public transportation and thereby have avoided any disciplinary problems.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge our employees because they supported International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 559, or any other union.

WE WILL NOT discharge our employees because they engaged in concerted activity for the purposes of mutual aid or protection.

WE WILL NOT deduct union dues from the wages of our employees unless they authorize us to do so.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL make William J. Davis, Lawrence R. Lukaszewski, Allen Savage, and Clifton S. Thomas whole for any losses they may have suffered as a result of our discharging them, with interest.

WE WILL offer Allen Savage full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, with interest.

MASHKIN FREIGHT LINES, INC.

I. INTRODUCTION

STEPHEN J. GROSS, Administrative Law Judge: Mashkin Freight Lines, Inc. (MFL) operated as a motor common carrier of freight from at least as far back as the late 1950's until November 1980.[1] Throughout most of that period MFL operated out of one terminal, in East Hartford, Connecticut.

As of the fall of 1979, MFL had about 150 drivers on its payroll, all of whom were members of Teamsters local 559 and were covered by a 3-year collective-bargaining agreement entered into in April 1979.

[1] MFL does not dispute the General Counsel's contention that during all material times it was an employer engaged in interstate commerce for purposes of the National Labor Relations Act (the Act). The record indicates that MFL ceased all operations in November 1980.

On October 1979 Walter J. Baralari acquired MFL. Soon after that acquisition Baralari began asking for changes in the collective-bargaining agreement on the ground that the agreement was unduly favorable to the employees and accordingly was forcing MFL into financial trouble. (Baralari expressed these concerns to Local 559 officials, to MFL's drivers as a group, and, apparently, to individual drivers.)

MFL's drivers, however, and their Union (Local 559) expressed a disinclination to change any of the terms of the agreement. In response, on January 10, 1980, Baralari entered into a collective-bargaining agreement with another Teamsters local, Local 807. The terms of the Local 807 collective-bargaining agreement were in line with those that Baralari had previously urged upon Local 559 and MFL's drivers. About 2 weeks after entering into the collective-bargaining agreement with Local 807, Baralari opened a second terminal, in North Bergen, New Jersey, and hired a total of about 50 employee drivers and owner-operators to staff that termimal. At that time—January 23, 1980—MFL notified all of its drivers who had been domiciled in East Hartford—i.e., all of the MFL drivers who had been with the Company prior to January 1980—that "we are transferring the whole of our operation to a terminal at . . . North Bergen, New Jersey." MFL thereupon laid off all of those drivers. (Throughout the remainder of this Decision I will refer to the drivers who worked for MFL prior to January 24 and who were domiciled in East Hartford—and who, consequently, were members of Local 559—as the "East Hartford drivers.")[2]

Notwithstanding the language of that notice, MFL did not shut down the East Hartford terminal: MFL's offices remained in the East Hartford terminal; most of MFL's dispatching continued to be out of the East Hartford terminal; customers continued to do business with MFL by calling the East Hartford terminal; MFL continued to do its vehicle maintenance at the East Hartford terminal; and the East Hartford terminal continued to be used as an MFL warehouse and freight transfer point. In fact the only aspect of MFL's operation at East Hartford that was wholly transferred to the new North Bergen terminal had to do with driver employment. As of January 24, 1980, East Hartford ceased being a domicile for MFL drivers and, concomitantly, MFL drivers always began their workweek by reporting to the North Bergen terminal.

MFL's January 23, 1980, notice to the East Hartford drivers, discussed above, went on to advise the employees that they must tell management "immediately" if they desired "to transfer to the . . . North Bergen, New Jersey terminal." The record in this proceeding contains no information on how many of MFL's East Hartford drivers notified management of their desire to transfer to the North Bergen terminal, or exactly how many of those employees MFL actually offered to put back on its payroll. But testimony in this proceeding suggests that after January 24, 1980, a total of between 8 and 10 of the East Hartford drivers were put back to work by MFL.

The employment arrangement between those East Hartford drivers and MFL took the following course: MFL would contact the selected drivers (whom MFL chose on the basis of seniority) and order them to report to work at a specified time at the North Bergen termimal. The drivers were expected to make their own way to the North Bergen termimal. On some occasions the drivers would then be given routine runs in the New York–New Jersey area. More often than not, however, the drivers would either be transported back to East Hartford in company vehicles or assigned, as drivers, to trucks destined for East Hartford. Once back at the East Hartford terminal, the drivers would operate MFL trucks throughout Connecticut, returning each night to the East Hartford terminal (and their own homes). MFL paid the drivers the standard $20 layover fee—which was intended to cover motel costs—even though the drivers went home for the night. (The theory was that North Bergen was their home terminal, not East Hartford.)

Finally, at the end of each workweek these drivers would either run their trucks back to the North Bergen terminal or be transported there in other MFL vehicles. The drivers then made their way back to the East Hartford area, where they all lived, in their own automobiles.

Only the East Hartford drivers were given the Connecticut runs by MFL. The record indicates that MFL made a "special effort" to give those drivers runs to and within Connecticut as much as possible, and that such assignments were far more convenient (and profitable) for those drivers than assignments in other areas would have been.

After January 24, 1980, MFL deemed all of its drivers to be operating under the Teamsters Local 807 contract, rather than the Local 559 contract that had covered the East Hartford drivers. MFL accordingly paid the East Hartford drivers on the basis of the Local 807 contract. And MFL deducted Local 807 dues from the East Hartford drivers' paychecks.

This proceeding concerns:

(1) Whether MFL violated the Act when it deducted Local 807 dues from the paychecks of the East Hartford drivers (discussed in sec. VI, below).

(2) Whether MFL's discharge on March 25, 1980, of three East Hartford drivers violated the Act (see sec. IV, below).

(3) Whether MFL's discharge of an East Hartford driver on April 30, 1980, violated the Act (see sec. V, below).

II. LITIGATION HISTORY

Case 39-CA-187 began with a charge filed on April 30, 1980, by East Hartford driver William Davis alleging that MFL wrongfully (a) "contributed . . . support" to Local 807 and (b) discharged Davis and two other East Hartford drivers in March 1980. The General Counsel followed with a complaint against MFL dated May 2,

[2] All parties agree that Local 559 and Local 807 are labor organizations for purposes of the Act.

1980.[3] I heard the case in Hartford on September 22, 1980.

East Hartford driver William Savage filed a charge against MFL in Case 39-CA-350 on September 30, 1980, alleging that he was wrongfully discharged by MFL. That led to the issuance of a complaint dated November 14, 1980.

I consolidated the two cases by order dated August 6, 1981,[4] and reopened the hearing. The consolidated hearing was held on August 10, 1981 (again in Hartford).[5]

III. OTHER LITIGATION

In early 1980 the General Counsel issued a complaint against Mashkin in Cases 39-CA-76, 39-CA-95, and 39-CA-102 alleging that MFL interrogated its employees concerning their union activities, that MFL discharged employees because of their union activities and their assertion of their Section 7 rights, and that MFL failed to bargain in good faith with Local 559 concerning the transferring of work from the East Hartford termimal.

Those proceedings were consolidated for hearing before Administrative Law Judge Charles M. Williamson, who has now issued his Decision which concludes that, among other things, MFL violated Section 8(a)(5) of the Act when, without bargaining or consulting with Local 559, it closed the East Hartford terminal, transferred its operations to New Jersey, and laid off the East Hartford drivers.[6] In order to remedy that unfair labor practice, Administrative Law Judge Williamson ordered Respondent to bargain collectively with Local 559, to reopen the East Hartford operation, to transfer back to that location any work which it transferred to its New Jersey location from East Hartford, and to make bargaining unit employees whole for any losses they may have incurred thereby.

Administrative Law Judge Williamson also concluded that MFL violated the Act by increasing its use of owner/operators without bargaining with Local 559 about the matter; failed to allow Local 559 to examime MFL's financial records in violation of Section 8(a)(5); dealt directly with its employees when it should have dealt with their bargaining representative; interrogated and coerced employees in violation of the Act; suspended employees for requesting union representation during the course of an interview that the employees had reason to believe might eventuate in disciplinary action; and discriminatorily discharged an employee in violation of Section 8(a)(3) of the Act.[7]

[3] The General Counsel also named Bari Leasing, Inc., as a Respondent, along with MFL. But no evidence was adduced to indicate that Bari Leasing had any connection with the alleged offenses, and the General Counsel agreed to the dismissal of the complaint against Bari Leasing: See transcript 1, p. 131. (There are two transcript volumes in this proceeding, and both are numbered starting with page 1. To avoid confusion, therefore, citations to the transcript dated September 22, 1980, will be prefixed with "I", and citations to the August 10, 1981, transcript will be prefixed "11.")

[4] See also tr. II, p. 4–5.

[5] The General Counsel and MFL each filed briefs after both the September 1980 hearing and the August 1981 hearing.

[6] Administrative Law Judge Williamson also found that MFL's layoff of its East Hartford employees beginning January 23, 1980, violated Sec. 8(a)(3).

[7] JD-387-81.

IV. MFL'S DISCHARGE OF DAVIS, LUKASZEWSKI, AND THOMAS

A. *The Facts*

During the week of March 17, 1980, MFL notified William Davis, Lawrence R. Lukaszewski, and Clifton Thomas to report for work at the North Bergen terminal on Monday, March 24. Each of the three told MFL that he would do so. All three had worked for MFL prior to January 24, 1980 (out of the East Hartford terminal) and Davis and Thomas had since worked for MFL under the arrangement described above (whereby East Hartford drivers reported for work at the North Bergen terminal but did most or all of their driving in Connecticut).

All three employees drove to North Bergen from the East Hartford area late Sunday afternoon; Lukaszewski and Thomas in one car, Davis in another. The three ate together at a restaurant in New Jersey and then checked into the same motel. Each of the three testified that throughout that night he was violently sick to his stomach, and that he felt better upon arising, but then again became violently ill. Each was still feeling extremely sick when the three went to the North Bergen termimal to report in. While waiting for the terminal to open, Davis had a telephone conversation with one of MFL's East Hartford dispatchers, during the course of which Davis said that he was too sick to work. When the North Bergen terminal manager arrived, Lukaszewski and Thomas each told the manager that he was too sick to work, to which the manager replied noncommittally. The manager then turned to Thomas, saying, "I suppose you're sick too." Thomas said that he was. The three employees then left the termimal and made their way back to East Hartford.

Later that day Lukaszewski called the East Hartford terminal manager to report that he had been too sick to accept an assignment at the North Bergen terminal. The East Hartford terminal manager responded: "I don't know why you listened to those guys down in Jersey . . . . You just listened to the wrong people. As far as I'm concerned, you're through."[8]

On March 25 MFL sent the following identical letters to Davis, Lukaszewski, and Thomas:

> This is to acknowledge your voluntary refusal to accept the assignment designated for you on March 24, 1980 at our North Bergen, New Jersey termimal. This action, taken in concert with two (2) other drivers, forces us to conclude that you do not wish to work at our New Jersey terminal.
>
> Accordingly, we have removed you from our seniority list.[9]

B. *MFL's Discharge of Davis, Lukaszewski, and Thomas—Conclusion*

MFL's motivation: MFL obviously fired the three drivers because of management's belief that the three had feigned illness and that their claimed inability to work

[8] Tr. I, p. 33.

[9] G.C. Exhs. 4–6.

was in fact a concerted refusal to work. The discharge letters (referring to each of the driver's refusal to accept an assignment "taken in concert with two . . . other drivers") and the terminal manager's comments to Lukaszewski ("I don't know why you listened to those guys down in Jersey") make that clear.[10]

An employer violates the Act if it discharges an employee because of its belief that the employee concertedly engaged in activity of the kind the Act protects. And it is immaterial whether the employer was correct in that belief. *N.L.R.B.* v. *Link-Belt Co.*, 311 U.S. 584, 589–90 (1941). Thus the question of whether Davis, Lukaszewski, and Thomas really were sick on the morning of March 14, 1980, does not have to be resolved. The issue is whether the concerted activity that MFL believed the drivers to be engaged in is the kind of activity that is protected by the Act.[11]

Turning to the nature of the employees' activity, in MFL's view that activity was the concerted false claim of illness. And it is clear that that kind of concerted activity is protected (assuming that the purposes of the activity are appropriate ones). See *Union Boiler Co.*, 245 NLRB 719 (1979); *Northern Telecom, Inc.*, 233 NLRB 1374 (1977); *Henning & Cheadle, Inc.*, 212 NLRB 776 (1974), enforcement denied on other grounds 522 F.2d 1050 (7th Cir. 1975).

As to the purposes of the employee activity in question, we are faced with the necessity of determining what MFL's management believed those purposes to be in circumstances in which: (1) MFL did not say what it thought those purposes were; and (2) the employees involved say that there was no purpose to the concerted activity because there was no concerted activity. And that requires that the Board look at the record as a whole to determine what reasonable inferences, if any, can be drawn about MFL management's beliefs about those purposes. See *Metropolitan Orthopedic Associates, P.C.*, 237 NLRB 427 (1978).

MFL argues, on brief, that the reason Davis, Lukaszewski, and Thomas "created a sham illness" was "in order to refuse work they simply did not wish to perform."[12] The apparent major premise inherent in that contention is correct. MFL would not have run afoul of the Act if in fact it fired the three drivers because, in the view of its management, the three claimed illness because they happened not to feel like working on March 24 or because they disliked the particular runs that MFL assigned to them that day.

But the facts of record do not suggest that that is why MFL fired the drivers.

As far as any dislike of their particular assignments is concerned, all three drivers reported in sick before they were given their assignments.

As for the claimed illnesses being a product of a generalized disinclination to work: (1) the three drove at their own expense from Connecticut to New Jersey to report in; (2) they traveled to New Jersey the evening before their reporting date, which necessitated restaurant and motel expenses (for which the Company did *not* pay[13]); (3) Davis and Thomas had been working out of MFL's North Bergen terminal for a week or two prior to March 24, apparently without incident; and (4) Lukaszewski had explicitly refused an assignment during the week of March 17 because of sickness, had no trouble with the Company in that connection, and had subsequently affirmatively volunteered to work for the week of March 24.

Under all those circumstances, it is unlikely that MFL's management could have come to the conclusion that Davis, Lukaszewski, and Thomas concertedly feigned illness due to bouts of laziness or the like.

What the record in this proceeding does suggest is that MFL knew that the East Hartford drivers, including Davis, Lukaszewski, and Thomas, did not like the wage scale under which the North Bergen terminal was operating; knew that employees like Davis, Lukaszewski, and Thomas were opposed to MFL moving the domicile of its employees to North Bergen; knew that such employees opposed shifting their membership from Local 559 to Local 807; and must have been aware that the reporting system that required drivers to travel from Connecticut to New Jersey in order to report for work was upsetting for the affected employees. And absent evidence to the contrary, it can only be assumed that, given MFL's belief that Davis, Lukaszewski, and Thomas concertedly feigned illness on March 24, MFL must have concluded that the three were protesting those circumstances when they reported in sick.

[10] MFL contends that Davis, Lukaszewski, and Thomas "voluntarily quit the employ of the Company" when they told their supervisor on March 24 that they were too sick to work. MFL br., p. 1; see also "special defense" in MFL's answer dated May 8, 1980. MFL bases that contention on the fact that (in its view) the employees were not actually sick when they declined to work. (None of the three in fact said they were quitting or otherwise indicated a desire to leave the employ of the Company. To the contrary they indicated their desire to remain with the Company.) An employer may for its own purposes use whatever terminology it likes in relation to any given employee behavior. But clearly, for the purposes of the Act (and under the usual meaning of the word), neither Davis nor Lukaszewski nor Thomas "quit," looking at either what the employees actually did or what MFL thought they did.

[11] While it appears to me that it is unnecessary for the purposes of this proceeding to determine whether the employees actually were sick, I have nonetheless considered the question. The answer is far from clear, but the preponderance of the evidence indicates that each of the three drivers was sick, as he claimed. On the one hand it is a surprising coincidence that all three of the drivers almost simultaneously became suddenly and violently ill. Moreover, none of the three saw a doctor, all had large breakfasts notwithstanding their claimed illness, Lukaszewski chose to report to the MFL terminal before 7 a.m. even though he was not scheduled to report until 9 a.m., and all were able to drive private vehicles back to East Hartford (or share in that driving) that same morning. Finally, there were a number of inconsistencies in the testimony of the three drivers on matters relating to their sickness. On the other hand there was nothing about the demeanor of the three drivers during the course of their testimony that indicated that their claims of illness were false; MFL submitted no proof of any kind purporting to refute the drivers' claims; and there is nothing in the record to suggest why Davis, Lukaszewski, and Thomas would undertake to drive all the way to North Bergen from the East Hartford area and then back again simply to feign illness. As to the testimonial inconsistencies, they were minor ones, of the kind to be expected in testimony given 6 momths after the event in question.

[12] MFL br., p. 3.

[13] As MFL knew (see tr. I, p. 62), Local 559 paid for the New Jersey motel expenses of those of its members who incurred them working for MFL. Each of the three drivers supported Local 559, as MFL also knew, and presumably would not have wanted to run up needless expenses for the Union.

Since a protest for any of those purposes relates squarely to conditions of employment or to bargaining agent identity, concerted activity to protest any of the foregoing circumstances is protected. And since the only reasonable inference to be drawn from the record is that MFL believed that the three drivers' refusals to work were in protest against one or more of those circumstances, MFL's discharge of the three drivers violated Section 8(a)(1) of the Act. (The discharges arguably violated Sec. 8(a)(3) as well. But that is open to question. And since the remedy will be the same whether or not Sec. 8(a)(3) is deemed to have been violated by MFL's action, no purpose would be served by resolving that question.)

I have considered the fact that Davis, Lukaszewski, and Thomas were asked in advance to take an assignment, specifically agreed to do so, and then, at the time work was to actually begin, concertedly refused (in MFL's view) to go to work. Under the circumstances, MFL's managment might well have felt deliberately deceived. But if the employees were discharged for that presumed act of deception, their dismissal letters presumably would have indicated such, and the letters did not. Similarly, no one from MFL took the stand to say that was the case. Moreover, there was no showing that the three drivers' refusal to work resulted in any hardship for MFL. Finally, Board precedent appears to indicate that a concerted refusal to work that would otherwise be protected does not lose that protection even if the work was a voluntary assignment that the employees had specifically agreed to undertake. See *Northern Telecom, supra.*[14]

The no-strike clause in the MFL-Local 807 agreement: Article 18 of the collective-bargaining agreement between MFL and Local 807 provides, in part, that "the Union agrees that there will be no strikes, work stoppages or slow downs . . . ."[15] (There is no comparable provision in the MFL-Local 559 agreement.)

Subject to certain exceptions, "individuals violating such clauses appropriately lose their status as employees." *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 280 (1956). The General Counsel does not contend that the MFL-Local 807 agreement was invalid or inapplicable to the employment relationship between Davis, Lukaszewski, and Thomas, on the one hand, and MFL, on the other. Arguably, therefore, the three lost their employee status when (in MFL's view) they concertedly feigned illness on March 24. And if they did, that activity was unprotected.

But MFL at no time referred to the no-strike clause—either in its answer, at the hearing, or on brief. (Indeed the Local 807 agreement entered the record as a General Counsel exhibit; and the clause in question was not mentioned before or at the hearing by anyone. It was referred to at all only in a short note in the General Counsel's brief.)

There does not appear to be any precedent directly on point. But cases that have arisen in comparable situations suggest that the Board ought not consider a no-strike clause as a defense to allegations of unlawful discharge unless the defense is raised in timely fashion by respondent. E.g., *Chicago Roll Forming Corp.*, 167 NLRB 961, 971 (1967); *N.L.R.B.* v. *Nettleton Co.*, 241 F.2d 130 (2d Cir. 1957). Moreover, as between Respondent and the General Counsel, it is Respondent who must be presumed to have the greater familiarity with collective-bargaining agreements to which it is a party, and who accordingly is in a better position to raise the issue of no-strike clause applicability. And unless the issue is timely raised, the General Counsel may be foreclosed from making a valid rebuttal to a defense based on the existence of a no-strike clause. Here, for example, had MFL raised the issue the General Counsel might perhaps have sought to show that unfair labor practices committed by MFL interfered with the free selection by the MFL employees of their bargaining representative (see *Mastro Plastics, supra*) or that it was not the intention of MFL and Local 807 that the no-strike clause in question cover three employee sick-outs.

I accordingly conclude that the applicability of the no-strike clause in the MFL-Local 807 collective-bargaining agreement was not raised in a manner appropriate for Board consideration.[16]

Other General Counsel contentions: The General Counsel contends that a reason that MFL discharged the three drivers was its desire to rid itself of employees who were members of Local 559. While it is true that an inference of that kind could be drawn from some of the facts of record in this proceeding and from the findings that Administrative Law Judge Williamson made in Case 39-CA-76, *et al.*, other facts point in the other direction. Specifically, MFL seemed to go out of its way to give its East Hartford drivers runs to and within Connecticut, assignments that greatly added to the convenience and financial well-being of the East Hartford drivers.[17]

The General Counsel did not show that MFL was forced to assign the East Hartford drivers to Connecticut runs as a matter of business necessity or otherwise, and the assumption accordingly must be that MFL could have assigned the East Hartford drivers to runs far from Connecticut if it so chose. Had MFL in fact been strongly motivated to rid itself of Local 559 drivers, it presumably would have assigned the East Hartford drivers to non-Connecticut runs in the hope that the drivers would thereby find working for MFL too inconvenient to continue. Under these circumstances I cannot find that, by discharging Davis, Lukaszewski, and Thomas, "Re-

[14] The rule seems to be that employees are allowed on protected bite of that particular apple. See *Gulf-Wandes Corp.*, 233 NLRB 772, 776 (1977).

[15] G.C. Exh. 3.

[16] The General Counsel argues that the clause does not apply because the three drivers were not in fact engaged in a work stoppage. (Br., fn. 11.) But an alternative view is that for purposes of no-strike clause issues, MFL's mistake about the existence of a work stoppage is relevant only in an action brought to enforce the agreement, not in an unfair labor practice proceeding before the Board. Fortunately the matter need not be resolved here.

[17] As touched on in sec. I, above, North Bergen technically was the domicile of the MFL drivers after January 24. Thus the drivers received $20 per diem from MFL on all runs that required the drivers to be away from the North Bergen terminal overnight. As a result, on runs in the East Hartford area the East Hartford drivers received per diem compensation even though they ate and slept at home.

spondent was merely continuing its campaign to rid itself of union drivers."[18]

V. MFL'S DISCHARGE OF ALLEN SAVAGE

A. *The Facts*

As of January 1980 Allen Savage had worked as an MFL driver for 16 years. (He was, of course, a member of Local 559.) Savage was laid off, with all the other East Hartford drivers, on January 24 (see sec. I, above). Then in early March 1980 MFL transferred Savage to its North Bergen terminal. And like the other East Hartford drivers who had been transferred to that terminal, Savage did most of his driving in Connecticut out of the East Hartford terminal.

While the following 7 weeks of his employment by MFL were largely uneventful, Savage did raise a number of complaints with MFL's management during the period. On one occasion Savage refused to drive a truck with a bad front end. On another, Savage and an MFL dispatcher got into an argument over a change in Savage's starting time that, in Savage's view, was made without any notice. Finally, Savage complained to MFL's East Hartford terminal manager about MFL's unauthorized deduction of Local 807 dues and about MFL's failure to abide by the terms of its collective-bargaining agreement with Local 559.

On the morning of April 28, 1980 (Monday), Savage routinely reported for work at MFL's North Bergen terminal and, as it happens, was given a run in New Jersey. During the course of his workday, Savage learned that his wife's car was inoperable.

The significance of that is this: Savage's wife has leukemia, and has and the disease for the past 5 years. Due to that disease, from time to time—and the times are unpredictable—Savage's wife needs prompt medical care and needs transportation to get to that care. As Savage put it:

> [S]he'll get to a point where she'll have to go in, either for shots or blood transfusion. And she never knows when until she gets to a certain point, and then she calls a doctor and he has her come in.[19]

The car's malfunction accordingly had serious implications.

There is no dispute that many MFL supervisors knew that Savage's wife had leukemia and that as a result she sometimes needed special care.

After learning of his wife's problem with her car, Savage promptly spoke to an MFL dispatcher, mentioned the problem, and asked if there was "any possible way I could come home."[20] The dispatcher replied that it was too late in the day (April 28) to get Savage back to Connecticut that day, but that "if possible, I'll get you home tomorrow."[21]

Savage remained overnight in New Jersey and on April 29 was assigned to a run that should have resulted in Savage getting back to Connecticut that evening. But delays arose at the shipper's warehouse and Savage's truck was not loaded in New Jersey until after 8 p.m.

At that point Savage called his dispatcher to report his status. The dispatcher told Savage to take the truck into the North Bergen terminal and to remain overnight in New Jersey. (While the record is not explicit in this regard, there is no doubt that the dispatcher planned to have Savage drive the truck to East Hartford the following morning.)

Neither the dispatcher nor any other MFL supervisor testified, and thus we do not know with any certainty why the dispatcher ordered Savage to bring the truck into the North Bergen terminal rather than to have Savage drive directly to East Hartford, which is where the load in the truck was destined. But presumably that order had to do with restrictions on driver duty time imposed by the United States Department of Transportation (DOT). DOT regulations forbid truckdrivers to remain on duty for more than 15 hours in any 24-hour period (with some exceptions not here relevant). Since it takes 3 or 4 hours to drive a truck from North Bergen to East Hartford, and since Savage had been on duty since 6:30 a.m. on April 29, Savage could not have driven to East Hartford from New Jersey, starting after 8 p.m., without violating DOT regulations.

Savage, however, felt that he had to get home to his wife and insisted that the dispatcher route him directly back to East Hartford. According to Savage's testimony (which I credit), the conversation ended this way: the dispatcher said, "'Al, I'm sorry, I can't bring you home.' I said, 'well I'm coming anyway. I have to come home. . . .' He again stated that all he could do was tell me what they had told him to tell me. And I told him, 'I didn't care at this point. I was coming home to see what was wrong at home. . . .' He said, 'you do what you want to.'"[22]

Savage did drive the truck to East Hartford; the drive was uneventful, and he pulled in about 12:30 a.m. (April 30), completed his routine checkout procedures, and left the terminal at 1 a.m., about 18-1/2 hours after he began duty at 6:30 a.m. on the 29th.

Savage asked to take the morning off and reported back to the East Hartford terminal about 1 p.m. on April 30. Upon his arrival at the terminal the terminal manager asked Savage why he had "quit." Savage responded that he had not quit. According to Savage's credible testimony the conversation then went as follows:

> He says "when you brought home—brought the load in last night, after you were told to lay over, it's a voluntary quit." I said, "Sal, I've worked here almost 17 years, I do not intend to quit. Now, you can fire me, but I'm not going to quit. I didn't put all this time in here to walk in here and quit." I tried to explain to him what had happened. I was promised I could come home the next day. "Well,"

[18] G.C. br., p. 8.

[19] Tr. II, p. 42.

[20] *Id.* Savage's car was not at the North Bergen terminal. Prior to the start of the workweek Savage had driven to MFL's East Hartford terminal, met another East Hartford driver there, and rode to North Bergen in the other driver's car.

[21] Tr. II, p. 43.

[22] Tr. II, pp. 50-51.

he says, "as far as this—Mr. Baralari's concerned, you're all done."[23]

A day or two later Savage received the following letter from MFL:

> This is to acknowledge your refusal to accept or follow your direct orders during your period of employment on April 29, 1980 and your illegal and improper taking of company equipment for personal use to transport you from our New Jersey terminal to your home in Connecticut. We further acknowledge your statement that if you are not fired you would quit. Accordingly, you have been removed from our seniority list as of April 29, 1980.[24]

B. *Other Background Circumstances*

Applicable collective-bargaining provisions: As far as Savage was concerned, he was still represented by Local 559. The collective-bargaining agreement between that Local and MFL provides:

> In respect to discharge or suspension, the Employer must give at least one (1) warning notice of the specific complaint against such employee . . . . No warning notice need be given, however, to any employee before he is discharged if the cause of such discharge is dishonesty, recklessness resulting in a serious accident while on duty, the carrying of unauthorized passengers or the consumption of alcoholic beverages as set forth in the DOT rules and regulations.[25]

MFL contends that the collective-bargaining agreement between Local 807 and MFL was the agreement that covered Savage's employment. That agreement has much the same language as Local 559's:

> Prior to suspending or discharging the Employer shall give at least one (1) warning notice of the specific complaint against such Employee, in writing, to such Employee . . . . except that no warning notice need be given to any Employee before he is discharged or suspended for any of the following causes: A. Theft of money, goods or merchandise during working hour; Acts of dishonesty; B. Drunkeness, or being under the influence of liquor or drugs during working hours; C. Calling an authorized strike or walkout; D. Assault on Employer [or] his representative during working hours; E. Failure to report an accident which the Employee would normally be aware of; F. Recklessness resulting in a serious accident while on duty; G. Carrying of unauthorized passengers in the cab of a truck while on duty.[26]

On the face of it, Savage was guilty of none of the acts that, under the terms of either collective-bargaining agreement, would have subjected him to immediate discharge. Since Savage was discharged without the warning required by those agreements, it appears that his discharge may have been in violation of MFL's contractual obligations.

Earlier violations of DOT regulations: The record shows that, during the 9-month period prior to his discharge, Savage violated DOT's maximum daily duty hours regulations six times, as follows:

Date	Savage's Hours On Duty
July 24, 1979	16-1/2
Aug. 23, 1979	17
Aug 30, 1979	16-1/4
Sept. 4, 1979	16-1/2
Sept. 7, 1979	17
Sept. 24, 1979	16[27]

Other MFL practices: There had been a longstanding practice at MFL that drivers were not to be assigned runs that resulted in layovers for 2 nights in a row. And, in fact, Savage mentioned that practice to the dispatcher when the dispatcher told Savage to lay over on the 29th. At least as a technical matter, however, the North Bergen terminal was Savage's domicile. Accordingly, assignments that resulted in Savage bringing his truck into the North Bergen terminal for the night could not—again speaking technically—be considered layovers.

Savage testified that on numerous occasions he had told dispatchers that he could not lay over after a dispatcher had ordered him to. But the record does not suggest that Savage had ever driven to his home terminal in contravention of orders that he lay over.

Other discharges: MFL discharged six drivers during the course of MFL's ownership by Baralari: Savage (as just discussed); Davis, Lukaszewski, and Thomas (as discussed in sec. IV, above); a driver whom Administrative Law Judge Williamson found was discharged for discriminatory reasons (see sec. III, above); and another driver whose discharge is not alleged to have violated the Act (he was fired for failing to report damage to his vehicle).

C. *Savage's Discharge—Conclusion*

Savage's offenses against MFL on the evening of April 29 clearly were not insignificant ones. He knowingly violated DOT's maximum duty hour regulations, rendering the Company liable (at least theoretically) to action by DOT. He knowingly violated a direct order by his dispatcher. And he used an MFL truck for personal purposes—to get back to his home city. In doing so it must be presumed that he endangered other users of the highways, since the purpose of the DOT regualtions in question is to keep unduly tired drivers off the highways.

[23] Tr. II, p. 55.

[24] G.C. Exh. 18. (As indicated above, I find that Savage told an MFL supervisor that he did not and would not quit. Accordingly, I can give no credence to the sentence in the letter referring to Savage saying that he would quit.)

[25] G.C. Exh. 22, art. XXIII.

[26] G.C. Exh. 3, art. 14.

[27] See G.C. Exhs. 21 and 22. The figure includes the time that Savage spent on breaks. See tr. II, pp. 102-103. All of those incidents occurred prior to Baralari's acquisition of MFL.

Beyond that, as discussed in section IV, above, the record does not suggest that MFL was determined to rid itself of those of its employees who were members of Local 559. And that certainly is true in Savage's case. Practically all of Savage's assignments permitted him to spend his evenings at home, and there is no doubt that MFL could have avoided doing that. Moreover, it is clear that on April 29 the MFL dispatcher made a real effort to give Savage an assignment that would get him back to Connecticut. (That effort failed only because of the unexpected delays that Savage encountered at the shipper's warehouse.)

Finally, disciplinary action in violation of a collective-bargaining agreement (as MFL's discharge of Savage apparently was) is not, for that reason alone, a violation of the Act. As for Savage's purpose in refusing to lay over, disciplinary action that appears hardhearted is not thereby an unfair labor practice. Moreover, there is no indication in the record that the only way available to Savage of handling his wife's needs was to drive an MFL truck to East Hartford. For instance the record indicates that MFL permitted drivers to "book off" more or less at their convenience. Presumably, therefore, Savage could have brought his truck into the North Bergen terminal on the evening of the 29th, booked off, and then made his way home using public transportation or a borrowed or rented car.

Nonetheless, it is my recommendation that the Board conclude that MFL violated Section 8(a)(1) and (3) of the Act when it discharged Savage.

To begin with, Savage's actions on the evening of April 29, 1980, were not particularly heinous—even ignoring the reasons for his actions. Exceeding DOT duty hours regulations is not unprecedented in the motor-carrier business, as witnessed by Savage's own record. As for his disobeying his dispatcher's orders and using an MFL truck for personal purposes, the fact is that the truck was destined for East Hartford anyway. In that respect Savage's offense was to ignore an order that he delay in driving a truck destined for East Hartford to East Hartford. Lastly, Savage was honest in his response to his dispatcher and his drive to East Hartford was without incident.

The record in this proceeding (and particularly the two collective-bargaining agreements in evidence) indicates that as a matter of industry practice a driver would ordinarily be entitled to a warning before being discharged for the kind of offenses committed by Savage on April 29, 1980—no matter how trivial his purpose in refusing to lay over and how low his seniority with the Company. Yet MFL chose to fire Savage. And MFL made that choice notwithstanding his 16 years with the Company and notwithstanding that, as MFL well knew, Savage's motivation in disobeying his dispatcher was to handle an urgent situation at home.

At some point an employer's disciplinary action can become so atypical, relative to the way people generally behave toward one another, that absent some further explanation by the employer the Board must presume that there was an unstated motivation behind the employer's action. Yet in this proceeding MFL gave no explanation for its decision to discharge Savage, beyond the discharge letter submitted into evidnece by the General Counsel. Indeed no one from MFL's management testified at all.

I recognize that the probable existence of an employer's unstated motive for disciplinary action is not enough, standing alone, to warrant the finding of a violation of the Act. See *Marriott Corporation*, 251 NLRB 1355 (1980). But here the evidence shows that Local 559 and the East Hartford drivers had consistently thwarted the wishes of MFL's owner, Baralari, that Baralari felt betrayed and unfairly treated by Local 559 and those drivers, that Baralari moved part of MFL's operation in order to avoid his obligation to those drivers, and that Savage vocally supported Local 559 even when working out of the North Bergen terminal.

Given the absence of any other reason for MFL's out-of-the-ordinary treatment of Savage, I can only conclude that the position of the East Hartford drivers relative to Baralari's contract proposals and the resulting difficulties Baralari encountered were a significant irritant to Baralari, that that irritation affected MFL's judgment in matters pertaining to the discipline of East Hartford drivers, and that it was that impact on MFL's judgment that led to MFL's decision to fire Savage.

In sum, I find that MFL would not have fired Savage but for his participation in an employee group (the East Hartford drivers) and a labor organization (Local 559) that opposed owner Baralari's proposals and actions regarding changes in working conditions. And that amounts to a violation of Section 8(a)(1) and (3).

VI. UNAUTHORIZED DEDUCTION OF DUES

The collective-bargaining agreement between Local 807 and MFL provides, in part, that:

> . . . the Employer shall furnish the Union with a list of employees who have signed checkoff authorization cards. The Employer shall deduct from said employees the dues, initiation fees and/or uniform assessments of the Union. . . .[28]

Starting in March 1980, MFL deducted monthly dues from at least some of the East Hartford drivers who had transferred to the North Bergen terminal and transmitted those dues to Local 807. By July 1980 MFL had submitted a total of $810 to Local 807 on that basis.

All of those transferred drivers had previously submitted authorizations to MFL that permitted MFL to deduct Local 559 dues from their wages. But none of those employees had ever executed checkoff authorizations on behalf of Local 807.

The General Counsel claims that MFL thereby violated Section 8(a)(1) and (2) of the Act. MFL contends that it did not violate the Act by its deduction of dues on behalf of Local 807 since the employees had authorized the deduction of Local 559 dues and had signed statements accepting transfers to New Jersey under the terms and conditions in effect there.[29]

[28] G.C. Exh. 3, p. 4.

[29] It appears that all of the East Hartford drivers employed by MFL at North Bergen specifically agreed that they desired "to transfer" to the

Continued

The Board has long held that an employer violates Section 8(a)(1) and (2) of the Act if it deducts union dues from an employee's wages absent authorization by the employee of such deduction. E.g., *Dan T. Edwards and Son d/b/a Western Auto Associate Store*, 143 NLRB 703 (1963). And, clearly, an employee's authorization of dues deductions on behalf of one labor organization does not amount to a dues deduction authorization in regard to other labor organizations. As to the statements that the transferred employees gave to MFL indicating their desire to transfer, those statements by their terms related only to their interest in employment at the North Bergen terminal. The statments give no indication, even implicitly, that the employees wanted MFL to make any payments to Local 807 on their behalf.

In sum, MFL violated Section 8(a)(1) and (2) when, without authorization, it deducted moneys from the wages of the East Hartford employees who had transferred to the North Bergen terminal and remitted such moneys to Local 807. See, generally, *American Geriatric Enterprises, Inc., etc.*, 235 NLRB 1532 (1978).

VII. OTHER ISSUES

A. *Deferral to Arbitration*

The MFL–Local 807 collective-bargaining agreement provides for grievance processing, including arbitration. MFL argues that "Board acquiescence in accepting these charges [of the alleged discriminatees] and failing to refer the parties to arbitration is to discourage parties from arbitrating at all . . . ."[30]

MFL's contention runs afoul of a long line of Board cases to the contrary, both as regards the discharge of Davis, Lukaszewski, Thomas, and Savage (see, e.g., *Union Boiler Company*, 245 NLRB 719 (1979)), and the 8(a)(2) allegation (see, e.g., *Servair, Inc.*, 236 NLRB 1278, fn. 1 (1978)).[31] Moreover, this proceeding relates in part to MFL's preference for its agreement with Local 807 rather than its agreement with Local 559, and the impact of that preference on the East Hartford drivers (who, turn, all supported Local 559). And Administrative Law Judge Williamson's Decision concludes that MFL's shift to North Bergen (and, therefore, to Local 807) was undertaken improperly. Under all these circumstances it would be particularly inappropriate to require the East Hartford drivers to turn to the grievance procedures of the MFL–Local 807 agreement.

B. *Alleged Harassment of Respondent by Subregion 39*

MFL's brief refers to the Subregion's refusal to permit Davis to withdraw his charge notwithstanding a settlement worked out between Davis (the Charging Party) and Thomas on the one hand, and MFL on the other, and to alleged arbitrary behavior toward MFL by the Subregion. "Such behavior is clearly a violation of the Administrative Procedure Act and grounds for dismissing the complaint." MFL br., p. 8.

But the record fails to show any misbehavior by any element of the Board or by the General Counsel. See *Community Medical Services of Clearfield, Inc., d/b/a Clear Haven Nursing Home*, 236 NLRB 853 (1978). In any case, since the evidence presented by the General Counsel shows that MFL violated the Act in several different respects, it can hardly be contended that the General Counsel prosecuted frivolous complaints at MFL's expense.

I conclude, accordingly, that there is no merit to MFL's contention that the complaint should be dismissed on the ground that the General Counsel's behavior violated the Administrative Procedure Act.

CONCLUSIONS OF LAW

1. Mashkin Freight Lines, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 559 and Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are labor organizations within the meaning of Section 2(5) of the Act.

3. By discharging William J. Davis, Lawrence R. Lukaszewski, and Clifton S. Thomas on March 25, 1980, MFL violated Section 8(a)(1) of the Act.

4. By discharging Allen Savage on April 30, 1980, MFL violated Section 8(a)(1) and (3) of the Act.

5. By, without authorization from the affected employees, deducting moneys from the wages of employees and remitting such moneys to Local 807, MFL violated Section 8(a)(1) and (2) of the Act.

6. The unfair labor practices referred to in paragraphs 3, 4, and 5, above, affect commerce within the meaning of Sections 2(6) and (7) and 10(a) of the Act.

7. There is no evidence that Bari Leasing, Inc., violated the Act in any respect.

THE REMEDY

It is evident that the remedy to be ordered in Cases 39–CA–76, 39–CA–95, and 39–CA–102 (see sec. III, above) will affect the remedy that ought to be ordered here. But the Board has not yet acted on Administrative Law Judge Wiliamson's Decision. For present purposes it accordingly seems best to order a remedy here that takes into account only the matters litigated in this proceeding.

The recommended Order will require MFL to cease and desist from the following acts:

1. Engaging in the unfair labor practices described in section VIII, paragraphs 3, 4, and 5.

2. Interfering with, restraining, or coercing, in any like or related manner, its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

The recommended Order will require that MFL, at such time as it resumes operations, reinstate Allen Savage to the position he previously held, or, if that position does not then exist, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges. (Reinstatement of Davis, Lukas-

---

North Bergen terminal (see, e.g., G.C. Exh. 8 (a)) and, prior to reporting, were advised that there was a "labor agreement covering that terminal" (G.C. Exh. 8 (b)).

[30] MFL br., p. 7.

[31] Modified on other grounds 607 F.2d 258 (9th Cir. 1979).

zewski, and Thomas is not being ordered since MFL previously offered reinstatement to all three.[32])

The recommended Order shall also require MFL to make Davis, Lukaszewski, Savage, and Thomas whole for any loss of earnings they may have suffered as a result of their unlawful discharges by MFL. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon[33] to be computed as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).

Finally, MFL will be required to notify its employees of the action being ordered by the Board

As a last matter, the General Counsel urges that I order MFL to reimburse its employees for any Local 807 dues wrongfully deducted from their wages. The Board may ultimately determine to do that (in light of the matters litigated in Cases 39-CA-76, *et al.*). But the Local 807-MFL collective-bargaining agreement contains a union-security provision that appears to comply with the requirements of the Act. And the agreement itself is presumptively valid absent the General Counsel's contentions to the contrary. Under the circumstances a reimbursement order would not be appropriate. *American Geriatric Enterprises, 235 NLRB 1532.*

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I hereby issue the following recommended:

ORDER[34]

The Respondent, Mashkin Freight Lines, Inc., Hartford, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging any employee by reason of the employee's support for Local 559, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters), or any other labor organization, or by reason of any other concerted activity for the purpose of mutual aid or protection.

(b) Assisting Teamsters Local 807 by deducting from the wages of any employee and remitting to Local 807 amounts equal to union dues when such deductions are not authorized by the employee.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

(a) At such time as Respondent, or its successors or assigns, resumes operations, offer Allen Savage full reinstatment to his former position or, if that position does not then exist, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

(b) Make William J. Davis, Lawrence R. Lukaszewski, Allen Savage, and Clifton S. Thomas whole for any losses they may have suffered by reason of their unlawful discharges, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other documents necessary to analyze and compute the amount of backpay due under this Order.

(d) Post the attached notice marked "Appendix"[35] at its facilities at such time as Respondent or a successor or assign resumes operations. Copies of the notice, on forms to be provided by the Officer-in-Charge, Subregion 39, shall be signed by the authorized representative of Respondent or its successor or assign and maintained by it for 60 consecutive days after posting, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Officer-in-Charge, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply with this Order.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act by Bari Leasing, Inc.

[32] See tr. 1, pp. 37, 103, 124.

[33] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[34] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[35] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."